QUESTIONS FOR A MULTI-STAKEHOLDER DIALOGUE
ON CONDUCTING BUSINESS WITH INTEGRITY IN WEAK GOVERNANCE ZONES

Response from
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Investor roles and home and host government responsibilities

1. Do companies have a role in helping to support reform of economic and political institutions in host societies?

   Yes. It is Important to recognise, however, that the imperative for commercial organisations is to make profits for shareholders. A benign economic, political and fiscal environment enshrined within the rule of law will create circumstances within which companies can generate sustainable returns for shareholders, as well as revenues and other benefits for the host country, and it is in the interests of companies to assist this process where possible. It is a mistake, however, to assume that commercial organisations will be driven by ethical or philanthropic considerations per se, except where these assist the process of creating the benign environment for profit. Where that environment does not exist, it should not be assumed that companies will invest in support of development goals alone, or indeed at all. Too much emphasis is placed on corporate social responsibility as required philanthropy rather than as building on the beneficial impact of core business.

   In this discussion, it should be remembered that while business can certainly be an agent for change, and clearly has a responsibility both to, and as in the case of human rights beyond, the rule of law, companies operate in an environment determined by host governments. Industry alone cannot change the environment, but it can work with others to assist the process of reform and to establish a framework of appropriate, practicable and acceptable conduct that will enjoy the support of the international community and civil society. In this regard, De Beers endorses the recommendations to the UK 'Commission for Africa' made by RAID (Rights and Accountability in Development).

2. If companies have such a role,

- Is this role different in weak governance zones than it would be elsewhere?

  No. The same imperative applies whether the host country has weak or strong governance. Companies will look to invest in projects that deliver an acceptable rate of return in those countries where the technical, fiscal, legal, political and security risks are manageable. This is as true in, say, Canada as the DRC.

- How are they to tell the difference between positive contributions to the reform process and inappropriate involvement in local politics (which Recommendation II.11 of the Guidelines asks them to avoid)?

  Companies cannot dictate to sovereign states. Companies have an interest in seeing the economic and political institutions develop in such a way that enables the investment imperative and should encourage the host country to create a benign environment through dialogue and by example. Support from the international community and civil society is indispensable.

  The Kimberley Process provides an interesting model for consideration. Much of its success was the result of galvanising support across an entire industrial sector (the diamond industry), thereby ensuring universal compliance.

- How are they to distinguish between their own roles and those of host governments, international organisations and home governments (e.g. their diplomatic services, ODA programmes, etc.)?

  Industry's role is to invest, to provide employment and, to a limited extent in some countries, to assist with infrastructure and capacity building. It is government's role to legislate and to create the economic, fiscal, political and security in which companies can operate to the mutual benefit of the people of the host country and shareholders. Industry can advise on the environment needed for benign inward investment, not create it.

  Although industry can and often should contribute, development and welfare provision must remain the responsibility of government.

Investor roles in weak governance host societies

3. Investors in the DRC responded to threatened or actual abuse of political power by cultivating political ties so as to establish a kind of "home made" investment protection. How do efforts of this type affect the development of the rule of law in weak governance host societies?

   Political connections are sought by companies in all countries to ensure investment protection. Lobbying of this sort is considered perfectly normal - and safe - in democratic societies with proper parliamentary safeguards and oversight by civil society. In more vulnerable countries, contacts and open dialogue by companies across the political spectrum can assist the reform process and reduce the threat of abuse of political power. Such abuse negates the benign investment environment.

   It should be the responsibility of all concerned to support the development of civil society and, if at all possible, a robust and independent media.

4. The DRC case study suggests that investors in weak governance host countries have to be well informed about the local political situation and about each other's activities.

- What should a company do if obtains information about wrongdoing by private actors or public officials? Should companies be encouraged to bear witness to wrongdoing? Under what circumstances should companies consider that they have whistle-blowing responsibilities?

  Companies wishing to invest in weak governance host countries must conduct the same due diligence as they would anywhere else into proposed partners or associates. Unlawful activities must always be reported to the appropriate authorities.

- Should their responses be different in weak governance zones than they would be in other investment environments? If so, how?

  No.

- If companies have a responsibility to make their knowledge about wrongdoing public, how can they protect themselves against retaliation by host country actors?

  Companies have a responsibility to report wrongdoing to the appropriate authorities.

5. The DRC case study shows that oil and mining companies provided "monetisation" services that converted the DRC's natural resource assets into (mainly) financial assets that accrued to state-owned enterprises or to the Treasury at a time when few financial and fiscal controls were in place.

   This is the nature of natural resource companies - the conversion of mineral wealth into revenue. The extent of financial and fiscal controls is a matter for the host country. However, if appropriate controls are not in place the investment environment is significantly degraded. Host countries can benefit enormously by the contribution of mining companies through payment to employees and suppliers, and through tax and royalty payments to the State, which are (should be) reinvested in services such as infrastructure, health and education. Additional community programmes - particularly in HIV/AIDS treatment - can be of great importance, but are not a substitute for paying workers properly, providing sustainable employment, investing in training and localisation, and building capacity.

   The Extractive Industries Transparency Initiative (EITI) is well placed to address this problem and deserves universal support.

- Does companies' provision of these services influence the nature of their responsibilities in weak governance host countries? If so, how?

  No, their responsibilities are the same as they would be elsewhere.

- How can these companies avoid giving the appearance that they are aiding and abetting people who might be in a position to take advantage of the weak financial and fiscal controls in the host country?

  Due diligence into proposed partners and associates, assisted by input from civil society.

6. Is there any special role that financial companies can play (besides their important and often legally required contribution to helping combat money laundering) in improving the institutional framework in weak governance host countries?

Corporate governance – creating shareholder value with integrity

7. The Disclosure Chapter of the Guidelines encourages companies to apply high standards of financial and non-financial disclosure. Do companies have an extra duty of transparency when investing in non-transparent host countries or are their responsibilities in this area the same in all host countries?

   Responsibilities should be identical in all host countries. Mining companies should be party to the Extractive Industries Transparency Initiative to "publish what they pay". This principle should apply also to governments - "publish what you get" - particularly where local legislation requires the payment of 'bonuses' etc.

8. OECD societies have valid reasons – grounded in the public interest -- for holding large, publicly listed companies to higher transparency standards than smaller and/or unlisted companies. The case study of publicly listed junior mining companies with DRC investments suggests that the juniors have smaller, less open boards than large companies; are less likely to report on company policies, management practices and performance in non-financial areas. The small unlisted mining companies in the case study are found to be less transparent than both large and small publicly listed companies in the financial and non-financial areas.

   Again, as stated above, the Kimberley Process provides an example of how smaller companies can be included in the effort to establish best practice through the establishment of pan-sector organisations such as the World Diamond Council.

- Should junior and small unlisted companies be encouraged to use their boards to assign high strategic priority to the ethical management of their investments in weak governance zones? If so, how could this be done (e.g. add board members, create a special committee with access to relevant expertise)?

  Please see answer below

- Recommendation II.8 of the Guidelines asks companies "to develop and apply … management systems that foster a relationship of confidence..." with the societies in which they operate. The Disclosure chapter encourages them to communicate information on "systems for managing risks and complying with laws, an on statements or codes of business conduct". How do these recommendations apply to small unlisted companies and to junior companies in weak governance zones? Should they be

encouraged to adopt internal compliance and external non-financial reporting practices that the case study shows to be common among larger extractive industry companies?

Please see answer below

- Chapter I of the Guidelines acknowledges that small- and medium-sized companies may not have the same capacity to observe the Guidelines as larger enterprises. Is asking the juniors and the small unlisted companies to open up their boards, adopt advanced compliance programmes and engage in extensive non-financial reporting equivalent to asking these companies to act like large publicly listed companies? If so, is this reasonable?

  The same minimum standards should apply to all companies, large or small. Whilst it may be unreasonable to expect small companies to adopt the same levels of reporting as large and listed companies, in weak governance countries in particular any lowering of the requirements on integrity and transparency will encourage irresponsible elements. In terms of legislation and guidelines affecting business practice, a level playing field is essential.

Doing business with weak governance state-owned enterprises (SOEs)

9. The case study shows that many OECD-based companies had joint ventures and other business relations with SOEs in the DRC and suggests that these SOEs' governance rules were weak. OECD and non-OECD experience shows that weak governance SOEs can be a mechanism for lowering public wealth through waste or questionable business practices. Through their joint venture arrangements, OECD based companies provide services and revenues to SOEs.

- Are companies' responsibilities the same when they enter into joint ventures with weak governance SOEs as their responsibilities with stronger governance SOEs?

  Yes, but bearing in mind that the responsibility for proper governance of SOE lies with governments, not industry.

- What SOE characteristics should an investor look at when considering whether or not to enter into partnerships with weak governance SOEs and when deciding how such partnerships should be managed?

  Precisely the same as they would be with any other potential joint venture partner with the investment imperative front of mind and due diligence applied in terms of proper disclosure, financial reporting and auditing, board composition and possible conflicts of interest etc.

- Guidelines Chapter X asks companies to conform "transfer pricing practices to the arm's length principle." Should companies be encouraged to apply this principle when structuring transactions with SOEs, even when it is not required by law or is not a common business practice in the host country?

  Yes, companies should use their best endeavours in this regard and insist upon proper internal controls. When "not required by law or not common business

practice" in the host country may be difficult for SMEs to achieve when contemplating an otherwise acceptable joint venture with a SOE.

- Does Annex Table 1 – drawn from the OECD Corporate Governance Principles and the Guidelines for Managing Conflict of Interest in the Public Sector -- provide a useful list of considerations for identifying weak governance SOEs?

  Yes.

10. Many of the larger multinational enterprises in the DRC mining sector tend to be non-operating shareholders in mixed public/private companies. In this respect their positions and interests are similar to those of the DRC citizens. In addition, large publicly listed companies tend to have significant expertise in corporate governance, involving elaborate and transparent governance practices. The current DRC government has identified SOE reform as a policy priority.

- Should such companies be encouraged to seek to protect the interests of host country citizens (as shareholders in these partially state-owned companies) or are their responsibilities limited to protecting the interests of their own shareholders?

  Yes. Where there is shared ownership - even indirectly - companies will seek to protect the interests and maximise the returns to all shareholders/stakeholders.

- Recommendation II.6 of the Guidelines asks companies to "uphold good corporate governance principles", while Recommendation II.3 asks them to "encourage local capacity building through close cooperation with the local community, including business interests". Should large companies be encouraged to share their governance expertise with their SOE partners?

  Yes, this would normally form part of a partnership or joint venture agreement.

Corporate tax payments into weak governance fiscal systems

11. Do companies that make large tax and royalty payments to weak governance fiscal systems have a role in supporting reform of these systems?

    Yes, to use best endeavours to encourage transparency. Business can help to create a positive environment and influence such reform - and it is in its interest so to do - but is a guest in the host country and cannot dictate.

    Again, the EITI is leading the way on this issue.

12. If it is agreed that companies have such roles, then:

- How do these relate to those of other actors, notably host governments and international financial institutions (whose mission is *inter alia* to promote public sector reform)?

  Dialogue with other interested parties to see where and how industry can assist the process. Need to engage with shareholders, employees, partners and suppliers and the local communities.

- How can companies most effectively go about supporting reform? Should companies refrain from signing contracts with governments that prohibit them from publishing their payments to host country treasuries? Are there countervailing concerns about business confidentiality that cannot be met through appropriate contracting?

  Constructive engagement with all relevant stakeholders. Where possible publish payments, where restrained from doing so engage with governments on benefits of transparency re good governance etc. Again, a level commercial playing field is needed to avoid inappropriate advantage.

13. Do the questions set forth in Annex Table 2 – which are based on the OECD Best Practices for Budget Transparency – provide a good basis for identifying weak fiscal systems and areas where reform is needed?

    Yes.

Eradicating bribery of public officials

14. Chapter VI of the Guidelines asks companies to promote employee awareness of and compliance with company policies against bribery and extortion and to adopt management control systems that discourage bribery and corrupt practices. Do participants agree that these recommendations are particularly relevant for investors in weak governance zones, where bribery and corruption is common?

    Yes, but this principle applies everywhere. In practice, however, the payment of 'incentives' is a normal and accepted mode of doing business in many countries, including many weak governance countries where some government officials rely on these payments to support their families. And what constitutes a 'consultancy fee'? The responsibility here lies with governments operating properly within, and applying, the rule of law. Companies must avoid payments beyond those necessary to the normal conduct of business.

15. Recommendation VI.2 of the Guidelines asks companies to "ensure that remuneration of agents is appropriate and for legitimate services only". When a company's agent or other business partner is found to have bribed public officials, is it sufficient for the company to severe its relationship with the agent or should it be encouraged to take additional remedial actions? If so, what kinds of actions would be appropriate?

    Companies should sever relationships with corrupt agents and report any illegal activities.

    In conclusion, one of the most effective ways for all sectors to achieve many of the objectives set out in the Guidelines is to support, and where appropriate assist, the development and maintenance of a free civil society and a robust and independent media.